QUESTIONS PRESENTED

1. Whether Petitioner has produced an unambiguous showing that, in enacting 12 U.S.C. § 92 with the goal of permitting small-town national banks to generate supplemental revenues by engaging in the state regulated business of selling insurance, Congress expressed its "clear and manifest intent" to preempt traditional state law controlling the identities and activities of those licensed to sell insurance in the State?

2. Whether a state law that protects current and potential future policyholders by prohibiting licensed agents from affiliating with certain financial institutions was "enacted for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

3. Whether a provision of federal law buried in the Federal Reserve Act that grants some national banks charter authority to participate in the state regulated business of selling insurance, but expresses no intent to intrude upon traditional state insurance regulation, and was enacted at a time when Congress believed itself to lack constitutional authority so to intrude, "specifically relates to the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1837

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

— v. —

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE COUNCIL OF INSURANCE AGENTS AND BROKERS IN SUPPORT OF THE RESPONDENTS

PRELIMINARY STATEMENT

The Council of Insurance Agents and Brokers respectfully submits this brief as amicus curiae in support of the Respondents, in accordance with Rule 37.3 of the Rules of the Supreme Court of the United States. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICUS CURIAE

Since almost the inception of the institution of insurance, insurance agents have been the embodiment of insurers in their dealings with policyholders and potential policyholders. In that role, insurance agents and brokers have been on the front line of insurance regulation for more than one hundred years. The modern insurance agent is characterized by a high degree of professionalism, and takes seriously the responsibility of assisting insurance purchasers obtain reliable and appropriate insurance products. At stake in this case is the continued vitality of the state regulatory schemes that have fostered and guided the development of the role of the agent during this entire period— regulatory schemes from which the petitioner and its amici, in essence, now ask this Court to exempt a class of powerful financial institutions, based upon 12 U.S.C. § 92 (1916) ("Section 92"), which extended to national banks, located in small towns with a population of five thousand or less, the ability to engage in the business of insurance as agents.

The Council of Insurance Agents and Brokers (the "Council") is an unincorporated national trade association, founded in 1913 as the National Association of Casualty and Surety Agents. Today, the Council represents some 300 of the nation's largest commercial property and casualty insurance agencies and brokerage firms. Council members, who operate both nationally and internationally, conduct business in more than 2,000 locations, employ more than 120,000 people, and annually place 75 percent —some $90 billion— of commercial property and casualty insurance premiums in the United States. In addition, Council members specialize in a wide range of insurance products and risk management services for

business, industry, government, and the public. Council members also administer billions of dollars in employee benefits.

The Council is committed to promoting standards of excellence among insurance agents and brokers, and carries out that commitment through training, education, and research programs. The Council collaborates with the Wharton School of Business at the University of Pennsylvania in the development of course material on the subject of agency management. The Council sponsors workshops on financial management, commercial lines placement, and sales for its members. The Council also maintains a non-profit educational foundation, the Foundation for Agency Management Excellence, created to promote leadership and excellence in the community of agents and brokers.

The Council is also a leader in the discussion and debate, within the industry and in public fora, on issues affecting the future of insurance. It has actively participated in debates over legislative and regulatory initiatives, at the state and federal levels, affecting the institution of insurance, including debates over such issues as federal regulation, health care, environmental liability, and licensing reform. The Council has been active in this regard since its inception, and was a participant in the debates that attended the passage of the McCarran-Ferguson Act, 12 U.S.C. § 1011 et seq.

SUMMARY OF ARGUMENT

The Council respectfully submits that Section 92 cannot be properly construed to achieve the result that Congress, merely by enabling some national banks to engage in the state regulated business of insurance as agents, effectively swept away a cornerstone of the system of regulation commonly employed by the states to regulate the traditional business of private insurance, an industry the regulation of which has long been reserved to the states.

The licensure of insurance agents and brokers is central to the various state regulatory schemes for the regulation of the marketing and sale of insurance. The role of the agent or broker is a key part of the core relationship between the insurer and the insured that is regulated exclusively by the states, and licensure is the principal mechanism by which the persons or entities filling that role are regulated. When it enacted Section 92 in 1916, Congress did not believe it possessed any authority under the Constitution to regulate the business of insurance. Nor did Congress, in the language of Section 92, or in the legislative history attending its enactment, evidence any intention to displace any aspect of state regulation of the business of insurance, or to constitute national banks as a privileged class of insurance agents, free of state licensure requirements. Moreover, Congress's subsequent enactment of the McCarran-Ferguson Act should be viewed in this context as an explicit renunciation by Congress of any intent to interfere with any aspect of the state insurance regulatory scheme, including the licensure of agents and brokers.

Set against this background, Section 92 cannot be viewed as an "Act [that] specifically relates to the business of insurance" under Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Rather, Section 92 is merely an *enabling* provision, required to grant some national banks the corporate capacity to enhance their revenues by engaging in a state regulated business unrelated to that of banking. Section 92 is not, as petitioners contend, an *empowering* statute, authorizing those national banks within its purview to sweep aside state insurance regulation, and compete unfairly with traditional insurance agents and brokers who have met, and continue to be subject to, the burdens of state licensure.

ARGUMENT

I. STATE LICENSURE PROVISIONS ARE THE CENTRAL ELEMENT OF THE REGULATION OF THE MARKETING, SALE, AND OTHER ASPECTS OF THE RELATIONSHIP BETWEEN INSURERS AND THEIR INSURED.

Laws regulating the licensing of insurance agents and brokers protect the relationship between insurers and their insured by attempting to ensure that prospective policyholders obtain reliable insurance that is adequate for their needs. Almost fifty years ago, this Court recognized, in *Robertson v. People of the State of California,* 328 U.S. 440 (1946), that insurance agent licensing laws constitute a:

> series of regulations designed and reasonably adapted to protect the public from fraud, misrepresentation, incompetence and sharp practice which falls short of minimum standards of decency in the selling of insurance by personal solicitation and salesmanship.

> That such dangers may exist, may even be widely prevalent in the absence of such controls, is a matter of common knowledge and experience.

Robertson, 328 U.S. at 447 (cited with approval in *SEC v. National Securities*, 393 U.S. 453, 460 (1969)).

A leading commentator on insurance law notes that licensing laws are enacted "to protect the public from surrendering its money in exchange for questionable or worthless pieces of paper denominated insurance policies." 16 JOHN J. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 8632 (citing cases); *accord, e.g., Rizzo v. Price*, 294 A.2d 541, 543 (Conn. 1972) ("Since those purchasing insurance must rely on the advice of the agent and purchase insurance from or through him, the legislature sought to protect the public by a licensing procedure which insures that those engaged in the business are qualified."); *Wright v. Trotta*, 367 A.2d 557, 562 (Md. App. 1976) (same); *Great National Life Ins. Co. v. Chapa*, 377 S.W.2d 632, 635 (Tex. 1964) (quoting APPLEMAN); *Waite v. Holmes*, 327 P.2d 399, 407 (Mont. 1958) (same); *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 440 (Ohio 1941) (same); *Black Motor Co. v. Baughman & Datron Ins. Agency*, 160 S.W.2d 388, 390 (Ky. 1942) (same).

The regulation of the business of insurance by the states has been effected in large part by the regulation of insurance agents through licensure schemes for more than a hundred years. An early administrative law treatise, which in 1927 took the state regulation of the business of insurance as its subject, noted that the distinction between the license for an insurance company and the licensing of the company's agents

was "frequently ... obscured," and went on to note that "[s]ometimes the statutes make no provision for the issuance of a license or certificate of authority to the company as distinguished from the licenses issued to the agents, and control of the company is affected by a general revocation of all of its agent's licenses." EDWIN W. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 157 (1927) (footnotes omitted). The treatise discussion demonstrates that at this time, roughly contemporaneous with the passage of Section 92, the power to exclude inappropriate persons or entities from becoming licensed insurance agents, or to revoke the licenses of agents who had failed to conform to appropriate standards was a key element of broad-ranging regulation of the marketing and sale of insurance products, aimed at such concerns as misrepresentation in marketing, price discrimination or rebating, and the tying of insurance products to other goods and services, including the sale of stock. *See, generally,* PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES, § 14 at 157-84.

Currently, virtually every state has some licensure provision for insurance agents. Typically, the state regulations impose education requirements upon applicants for licenses, require that applicants for the license pass an examination on insurance and insurance law, and impose continuing education requirements upon licensees. State regulatory schemes also impose significant liabilities upon agents, including civil liabilities to both insurer and insured, and civil and criminal liabilities to the state. *See, generally,* BERTRAM HARNETT, RESPONSIBILITIES OF INSURANCE AGENTS AND BROKERS §§ 5.05 to 5.06, 5.10 to 5.13 (1995); THE NATIONAL UNDERWRITER CO., FC&S LICENSING,

COUNTERSIGNING & SURPLUS LINES LAWS (1994) (all state survey). Licensing laws and other laws that regulate the advertising and selling of insurance policies, and the qualifications and responsibilities of insurance agents and brokers, create the context within which policyholders effect the "spreading or transfer of risk," and directly control the interface between the insurer and the insured prior to, at, and in some circumstances beyond, the point of sale.[1]

The particular provision of Florida insurance law at issue here, Fla. Stat. § 626.988, contained in the Unfair Insurance Trade Practices Act of the Florida Insurance Code, is consistent with the Florida regulatory scheme as a whole. Section 626.988 prohibits insurance agents licensed in the State of Florida from being affiliated with defined classes of financial institutions, including both state and federally chartered banks and bank holding companies other than banks not affiliated with a bank holding company and located in a small town. Section 626.988 has been definitively found by the Florida courts to be a consumer protection statute that insulates policyholders and prospective policyholders from unfair coercion, "twisting" and misrepresentation, and other unfair and deceptive trade practices. *See Glendale Fed. Sav. and Loan Ass'n v. State Dep't of Ins.*, 587 So.2d 534, 535 n.1 (Fla. App. 1st Dist. 1991), *rev. denied*, 599 So.2d 656 (Fla. 1992); *Production Credit Ass'ns of Fla. v. Dep't of Ins.*, 356 So.2d 31, 32 (Fla. App. 1st Dist. 1978) ("The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.").

[1] This Court has indicated that these are relevant to determining what constitutes the "business of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

II. BECAUSE CONGRESS DID NOT BELIEVE IT COULD CONSTITUTIONALLY INTRUDE UPON THE REGULATION OF THE TRADITIONAL BUSINESS OF PRIVATE INSURANCE WHEN SECTION 92 WAS ENACTED, IT COULD NOT HAVE INTENDED THAT ENACTMENT TO PREEMPT THE LICENSURE OF AGENTS BY THE STATES.

A. Prior to the 1944 *South-Eastern Underwriter Ass'n* Decision, This Court Had Consistently Instructed Congress that It Was Without Constitutional Authority to Regulate the Traditional Business of Private Insurance.

From at least as early as this Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 182-85 (1869), until the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), Congress believed that it lacked any power under the Constitution to enact legislation affecting the business of insurance in any way. In *Paul*, an insurance agent subjected to a fine by the Commonwealth of Virginia for selling coverage by a New York insurer not licensed in Virginia argued in effect that the Virginia licensing requirement was a burden on interstate commerce. The argument was rejected by the Court, on the ground that contracts for insurance did not constitute commerce, and were not interstate transactions, but that the contract for insurance

was entirely a local transaction, governed wholly by local law.

The Court consistently took the same view in a line of subsequent cases, including several involving the application of state sanctions (including fines and deprivation of access to the courts to sue for premiums) for violations of insurance company or insurance agent licensing requirements. *E.g., Hooper v. California,* 155 U.S. 648, 649 (1895); *Noble v. Mitchell,* 164 U.S. 367, 368-69 (1896); *Nutting v. Massachusetts,* 183 U.S. 553, 556 (1902); *Northwestern Mutual Life Ins. Co. v. Wisconsin,* 247 U.S. 132 (1918); *Bothwell v. Buckbee, Mears Co.,* 275 U.S. 274, 275-76 (1927).

That view of the law changed with this Court's decision in *South-Eastern Underwriters Ass'n.* In that case, the Court did not expressly overrule its prior line of decisions, and did not expressly find that contracts for insurance themselves were suddenly to be deemed within Congress's power to regulate under the Commerce Clause. The Court did find, however, that Congress intended the Sherman Act to reach to the fullest extent of its power (322 U.S. at 558), and reasoned further, in light of other decisions applying the Commerce Clause power to a host of activities including some that were "non-commercial ... illegal and sporadic," that "it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation...." (322 US. at 549-50). Following this line of reasoning, the Court held that the Sherman Act applied to the activities of insurance companies. The Court did not attempt to address any consequences its decision might have regarding the interplay between

Congress's power under the Commerce Clause, and the traditional regulation of the insurance business by the states.

B. By Its Enactment of the McCarran-Ferguson Act, Congress Renounced Preemption of State Regulation of the Traditional Business of Private Insurance in the Absence of a Clear Statement of Contrary Congressional Intent.

The decision in *South-Eastern Underwriters Ass'n* placed the relationship between the traditional regulation of insurance by the states, and Congress's reinterpreted and expanded Commerce Clause power, into jurisdictional limbo. Congress quickly addressed this situation by enacting the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. *See FTC v. Travelers Health Ass'n,* 362 U.S. 293, 299 (1960).

In The McCarran-Ferguson Act, Congress acquiesced in the Court's specific decision in *South-Eastern Underwriters Ass'n* regarding the reach of the federal antitrust laws, but mitigated the effect of the decision by providing that federal antitrust laws would be phased into effect in the insurance industry after a waiting period, and then only to the extent that the states had not occupied the field in the interim. 15 U.S.C. § 1012(b) (proviso). Unable to restore the status quo existing before *South-Eastern Underwriters Ass'n* short of a constitutional amendment limiting the scope of the Commerce Clause, it "transformed the legal landscape by overturning the normal rules of pre-emption." *United States Dep't of Treasury v. Fabe,* 113 S.Ct. 2202, 2211 (1993). It did so by making it clear that its silence regarding any exemption of the business of insurance from an exercise of federal power (which the Court in *South-Eastern Underwriters Ass'n* had

interpreted as a refusal to exempt (322 U.S. at 556-57)), should not in the future be so construed. 15 U.S.C. § 1011 ("silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several states.") Instead, Congress provided, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance...." 15 U.S.C. § 1012(b). As this Court found in *Fabe*, Congress created a "clear-statement rule" barring preemption unless the "federal statute specifically requires otherwise." *Id.*

The form of Congress's response in The McCarran-Ferguson Act to *South-Eastern Underwriters Ass'n* leaves no doubt that Congress, prior to 1944, had not intended to, and did not believe it had, preempted or displaced any state regulation of the business of insurance. Once informed that it *had* the power to legislate regarding the business of insurance, and had exercised that power *sub silentio*, Congress acted quickly to change the interpretive framework of preemption in the area of insurance precisely so as to prevent the outcome now urged by petitioner from ever happening again.

It can fairly be concluded from Congress's corrective approach to *South-Eastern Underwriters Ass'n*, embodied in The McCarran-Ferguson Act, that Congress did not believe that it had at any time prior to that decision intended to enact any legislation that met the "specifically relates" test of 15 U.S.C. § 1012(b). Indeed, petitioner tries to head off the effect of this argument by presenting it as a *reductio ad*

absurdum derived from the reasoning of the Eleventh Circuit below. Petitioner's Brief at 46-47. But far from being absurd, this conclusion is manifestly correct; indeed, none of the arguments petitioner opposes to this conclusion withstands scrutiny.

Petitioner asserts that this conclusion "is contrary not only to [the McCarran-Ferguson Act's] plain language, but also to the clearly expressed views of its sponsors." Petitioner's Brief at 46. Presumably petitioner infers that because the Act itself contemplates retroactive application of the "specifically relates" test, there must exist legislation that meets the test. This inference is a leap unsupported by logic, however. But for the retroactive application of the "specifically relates" test, it would be possible for a court to determine with respect to other pre-McCarran-Ferguson Act enactments, as this Court did in *South-Eastern Underwriters Ass'n*, that Congress had legislated in this area *sub silentio*. But the retroactive imposition of the "specifically relates" test does no more than bar such a result; it does not imply that prior legislation exists that would *pass* the test.

Petitioner's reading of the legislative history betrays a similar lapse of logic. The specific colloquy petitioner points to does not contain an affirmation by the sponsors of the McCarran-Ferguson Act that previous legislation can be found that meets the "specifically relates" test. Indeed, the discussion between Senator Murdock and Senator Ferguson is directed at the converse conclusion. Senator Murdock is concerned with addressing the effect of the McCarran-Ferguson Act's language on previous legislation— specifically, the Sherman Act— that *fails* to meet the "specifically relates" test. He notes, given that failure, that

the provisions of Section 2(b) of the bill would permit states to "repeal," in effect, the application of the Sherman Act "insofar as it relates to the insurance business." He then proffers a technical modification to the text of the bill before the Senate, giving the antitrust provision contained in Section 4 of the bill precedence over the entire Act, that would prevent such an outcome, and Senator Ferguson accepts the amendment. Neither Senator addresses, at any point, the existence of previous legislation that might *meet* the "specifically relates" test, or characterizes that test as a "savings" clause. 91 Cong. Rec. 479 (1945). Indeed, petitioner's characterization as a "savings" clause a test which, if it had been applied by the Court in *South-Eastern Underwriters Ass'n* would have yielded a contrary result, barring application of the Sherman Act to the insurance business, borders on the wilfully perverse.

The cases discussed by petitioner on this point likewise fail to support its position. Two of those cases deal with Congress's ability to regulate federally created insurance or worker's compensation schemes, and are thus irrelevant to the issue presented here, or dealt with in the McCarran-Ferguson Act. *Texas Employers' Ins. Ass'n v. Jackson,* 820 F.2d 1406 (5th Cir. 1987), *rev'd on rehearing on other grounds,* 862 F.2d 491, *cert. denied,* 490 U.S. 1035 (1988) (dealing with provisions of the Longshoremen and Harbor Workers Compensation Act); *Wissner v. Wissner,* 338 U.S. 655 (1950) (dealing with the constitutionality of the National Service Life Insurance Act of 1940 without addressing or applying the McCarran-Ferguson Act). Nothing in the doctrine developed in *Paul v. Virginia* or its progeny denies Congress the right to establish self-contained, federal insurance schemes; those

cases only established that the regulation of the existing system of insurance based on private contract was reserved exclusively to the states. The third case discussed by petitioner is even more off the point. Although in *Hanover Ins. Co. v. Commissioner,* 598 F.2d 1211 (1st Cir.), *cert. denied,* 444 U.S. 915 (1979), the First Circuit noted that a provision of the Internal Revenue Code defining "insurance company income" passed the "specifically relates" test of the McCarran-Ferguson Act, that pronouncement was plainly dictum. An alternative, and manifestly more correct ground of decision, was available in this Court's holding in *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969): the system of federal taxation at issue in *Hanover Ins. Co.*, like the federal regulation of securities at issue in *SEC v. National Securities, Inc.*, simply does not seek to regulate "the business of insurance" at all.

Once petitioner's faulty logic is corrected, it must be concluded that the "specifically relates" test, when applied retroactively, was not intended to serve as a "savings" clause, but as a hurdle set high enough to prevent another result like that reached in *South-Eastern Underwriters Ass'n*. With this function in mind, it cannot be thought plausible that Section 92, enacted without comment to give small-town national banks charter authority to engage in the state regulated business of insurance selling, could so far clear that hurdle as to sweep away one of the central features of that state regulation: the licensure of agents. This strained reading, which without the "clear statement" this Court has found must accompany federal preemption in this area after enactment of the McCarran-Ferguson Act would have far-reaching consequences on the entire system of state regulation

of the business of insurance, must yield to the far more temperate and natural reading of that provision as an enabling act, giving small-town national banks the potential— not the indefeasible right— to engage in a state regulated business wholly distinct from banking.

CONCLUSION

For the foregoing reasons, The Council of Insurance Agents and Brokers, as amicus curiae, respectfully urges that this Court affirm the decision of the Eleventh Circuit below.

Washington, D.C.
December 8, 1995

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